IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 751

ADOLPH HOHENSEE, Petitioner

v.

MARILYN FERGUSON, ET AL, Respondents

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. S. MOORHEAD, JR.
DAVID W. CRAIG
MOORHEAD & KNOX
Attorneys for Respondents

[illegible] Bldg.
[illegible] 22, Pa.

INDEX

	PAGE
Counter-Statement of Question Presented	1
Counter-Statement of the Case	2
Argument	3
I. Dismissal of the case is well founded upon the ground of wrong venue alone	3
II. Dismissal, rather than transfer, is also justified by the failure of the complaint to state a claim upon which relief can be granted	4
Conclusion	6

TABLE OF CITATIONS

CASES

Hunt v. Crumboch, 325 U.S. 821, 826; 89 L.Ed. 1954, 1957	5
International Refugee Organization v. Bank of America National Trust & Savings Assn., 86 F.Supp. 884, 887	3
Jones v. Radio Corporation of America, 129 F.Supp. 440, 442	3
Klor's v. Broadway - Hale Stores, 359 U.S. 207, 3 L.Ed. 2d 741	5
Pinesich v. Miller, 89 F.Supp. 539	3
Polizzi v. Cowles Magazines, Inc., 345 U. S. 663, 665, 97 L.Ed. 1331, 1334	3
Radiant Burners v. Peoples Gas L. & Coke Company, ... U.S....., 5 L.Ed. 2d 358, 361	4
Skilling v. Funk Aircraft Company, 173 F.Supp. 939, 942	3

STATUTES

15 U.S.C. § 1	4
15 U.S.C. § 15	2, 3
28 U.S.C. § 1406(a)	3, 6

COUNTER-STATEMENT OF QUESTION PRESENTED

Where a federal court has dismissed an antitrust treble damages action on the ground that venue was wrongly laid, should the Court grant certiorari to review such a decision?

COUNTER-STATEMENT OF THE CASE

This action for treble damages, in connection with an alleged antitrust law violation, was instituted under 15 U.S.C. §15 by plaintiff-petitioner Adolph Hohensee in the District Court for the Middle District of Pennsylvania. The complaint stated that petitioner was engaged in interstate commerce and had been injured by a conspiracy of defendants-respondents involving alleged wrongs such as false arrest, abuse of process, libel and slander (5, 6)*.

Respondents Marilyn Ferguson and J. Alex Zehner, employees of the Pittsburgh Sun-Telegraph, a newspaper, were served with process personally in Pittsburgh, in the Western District of Pennsylvania (10, 11, 19).

The two named defendants-respondents, as well as other defendants, filed motions to dismiss the action on the ground that venue had been laid in the wrong district, supported by affidavits establishing that respondents resided in the Western District of Pennsylvania and had no agent in the Middle District of that state (9-11). Moreover, petitioner's complaint, in the fourth paragraph (5), alleged that respondents Marilyn Ferguson and J. Alex Zehner were engaged in business in Allegheny County, Pennsylvania, which is in the Western District.

* Numbers refer to pages of the Petition for Writ of Certiorari.

ARGUMENT

I.

Dismissal of the case is well founded upon the ground of wrong venue alone.

Both the district court and the court of appeals properly concluded that venue had been incorrectly laid in the Middle District of Pennsylvania, because 15 U.S.C. §15 clearly requires that venue be laid where the defendant resides, is found, or has an agent, and the record establishes that defendants' situation does not meet any of those criteria.

Under 28 U.S.C. §1406(a), if venue is wrong, the district court "shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Thus dismissal of the case is clearly justified by statute if a timely objection to venue is interposed. *Polizzi v. Cowles Magazines, Inc.*, 345 U.S. 663, 665, 97 L. Ed. 1331, 1334 (1952).

In administering the statute, the district courts have uniformly held that, in case of wrong venue, dismissal is mandatory unless it is affirmatively shown that transfer is necessary to avoid injustice. *Skilling v. Funk Aircraft Company*, 173 F. Supp. 939, 942 (1959). The lower court has discretion to determine that the interests of justice would warrant transfer, but where, as here, there is no showing of fair necessity for transfer, the action is to be dismissed. *International Refugee Organization v. Bank of America National Trust & Savings Assn.*, 86 F. Supp. 884, 887 (1949); *Pinesich v. Miller*, 89 F. Supp. 539 (1950); *Jones v. Radio Corporation of America*, 129 F. Supp. 440, 442 (1955).

Thus the result in the instant case can rest entirely upon the properly-exercised discretion of the district court, as the court of appeals has stated (29).

II.

Dismissal, rather than transfer, is also justified by the failure of the complaint to state a claim upon which relief can be granted.

Justification of the decision need not depend upon the district court's additional point that the complaint failed to state a cause of action upon which relief could be granted (21).

Nevertheless, the propriety of dismissal of the action, instead of a transfer of it, is further underscored by petitioner's failure to state a cause of action.

According to a very recent decision of this Court, statement of a claim upon which relief can be granted under Section 1 of the Sherman Act (15 U.S.C. §1) requires "allegations adequate to show [1] a violation and [2], in a private treble damage action, that plaintiff was damaged thereby . . ." *Radiant Burners v. Peoples Gas L. & Coke Company,* .... U.S. ...., 5 L. Ed. 2d 358, 361 (1961).

The present complaint, aside from the bald averment that there was a "conspiracy in restraint of trade and commerce", merely avers certain injuries purely personal to petitioner, in the nature of false arrest, libel, slander and the like (6). The complaint thus avers a combination or conspiracy in restraint of petitioner personally but not in restraint of trade.

Argument.

There are no "allegations adequate to show a violation" of the Sherman Act's prohibition against restraints of trade or commerce. Despite the averment of injury to petitioner, the complaint fails to suggest that such injury stemmed from any trade restraint. In other words, the complaint not only falls short of describing an unreasonable restraint of interstate commerce in general, but also fails to point out any damage to petitioner's particular segment of that commerce. Contrast: *Klor's v. Broadway-Hale Stores,* 359 U.S. 207, 3 L. Ed. 2d 741 (1959).

Petitioner's sole theory appears to be that he has a remedy under the antitrust laws for any personal wrong done to him, merely because he claims to be engaged in interstate commerce. However, this Court has clearly pointed out that the antitrust laws do not purport to afford remedies for all torts committed against persons engaged in interstate commerce: *Hunt v. Crumboch,* 325 U.S. 821, 826, 89 L. Ed. 1954, 1957 (1945).

CONCLUSION

Nevertheless, whether or not a cause of action has been well pleaded, the dismissal of the action is supported by the procedural statute alone: 28 U.S.C. § 1406(a).

Allowance of certiorari in this case would be inappropriate because only a simple matter of venue is involved.

Respectfully submitted,

W. S. MOORHEAD, JR.
DAVID W. CRAIG
MOORHEAD & KNOX
Attorneys for Respondents
MARILYN FERGUSON and J. ALEX ZEHNER